

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY ATTERBURY,

Petitioner,

2:03-cv-1809-GEB-DAD-P

VS.

DAVE GRAZINI,

Respondent.

ORDER

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's December 27, 2007 denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is ““debatable among jurists of reason,”” could be resolved differently by a different

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1 court, or is “adequate to deserve encouragement to proceed further.” Jennings v. Woodford,
2 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).¹

3 Petitioner has made a substantial showing of the denial of a constitutional right in
4 the following issues presented in the instant petition: (1) whether petitioner should be released
5 from custody because he has already served his sentence of twelve years and four months and his
6 time credits have been miscalculated; (2) whether petitioner is actually innocent of the charged
7 crimes because evidence that was not presented to the trial court proves that his conviction was
8 based on “false testimony and misleading evidence;” (3) whether petitioner should be allowed to
9 withdraw his plea of not guilty by reason of insanity and be released from custody because he
10 was not informed of the consequences of his plea nor that his confinement could be extended
11 “for life;” (4) whether petitioner was incompetent during the state court proceedings and should
12 therefore be allowed to withdraw his plea; (5) whether petitioner’s plea should be set aside
13 because he was not informed that, as a result thereof, he would be forced to take psychiatric
14 drugs which cause “catastrophic side-effects;” (6) whether petitioner was denied the right to a
15 jury trial when he entered his plea; (7) whether petitioner’s plea was involuntary because he was
16 not informed that his confinement could be extended beyond the maximum term of the sentence
17 imposed; and (8) whether petitioner’s sentence has been improperly “enhanced more than once
18 arising out of the same conduct.”

19 Petitioner also requests that he be allowed to proceed on appeal in forma pauperis.

20 The Federal Rules of Appellate Procedure provide as follows:

21 [A] party who has been permitted to proceed in an action in the
22 district court in forma pauperis . . . may proceed on appeal in forma
23 pauperis without further authorization unless . . . the district court
shall certify that the appeal is not taken in good faith or shall find
that the party is otherwise not entitled so to proceed . . .

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25 ¹ Except for the requirement that appealable issues be specifically identified, the standard
26 for issuance of a certificate of appealability is the same as the standard that applied to issuance of
a certificate of probable cause. Jennings, at 1010.

1 Fed. R. App. P. 24(a). This court has not certified that plaintiff's appeal is not taken in good
2 faith and has not otherwise found that plaintiff is not entitled to proceed on appeal in forma
3 pauperis. Accordingly, plaintiff's motion for leave to proceed in forma pauperis on appeal will
4 be denied as unnecessary.

5 Petitioner also requests the appointment of counsel on appeal. That request will
6 be denied without prejudice to its renewal in the Court of Appeals for the Ninth Circuit.

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. A certificate of appealability is issued in the present action;
9 2. Petitioner's request to proceed on appeal in forma pauperis is denied as
10 unnecessary; and
11 3. Petitioner's request for the appointment of counsel on appeal is denied without
12 prejudice to its renewal in the Court of Appeals for the Ninth Circuit.

13 Dated: January 22, 2008

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15 GARLAND E. BURRELL, JR.
16 United States District Judge
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